

 ORIGINAL

Ruben T. Varela
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Fullerton, California 92833
Plaintiff in Pro Per

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CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Ruben T. Varela,
Plaintiff,
vs.
**TATE & KIRLIN ASSOCIATES,
INC.,**
Defendant(s)

Case No.: SACV11-00888-JVS(MLGx)

**MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P.
12(b)(6)**

DATE: November 28, 2011
TIME: 1:30 p.m.
COURTROOM: 10-C
JUDGE: Hon. James V. Selna

I. INTRODUCTION

1. Plaintiff respectfully submits this Opposition to Defendant's Motion to Dismiss Pursuant to FRCP 12(b)(6) ("MTD") for failure to state a claim upon which relief could be granted. Plaintiff has pleaded sufficient facts to state a claim under the Fair Credit Reporting Act ("FCRA") 15 U.S.C. §1681b, the Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. §1692 *et seq.*, and California's Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") Cal. Civ. Code

§1788 *et seq.* Moreover, the First Amended Complaint (“FAC”) specifies that Defendant Tate & Kirlin Associates, Inc. (“TAK”) illegally pulled Plaintiff’s consumer report. The factual base of Plaintiff’s allegations against TAK is crystal clear:

“10. During the month of July, 2010, Defendant initiated a soft pull of Plaintiff’s consumer report from Trans Union, LLC (“Trans Union”) without a permissible purpose. (*Emphasis added.*)

2. If true, and Plaintiff affirmatively asserts that this statement is true, ¶10 of the FAC is inherently a clear-cut violation of the Fair Credit Reporting Act (“FCRA”).

3. Plaintiff’s FAC also specifies that Defendant TAK, after receiving a Notice of Pending Lawsuit (“NPL”) containing alleged violations of law by Defendant TAK, communicated with Plaintiff after a time period not authorized by Plaintiff (FAC ¶25) and for a purpose that was not expressly granted under the NPL (FAC ¶26), and therefore impermissibly communicated with Plaintiff at a time or place known, or which should have been known to be inconvenient to the Plaintiff. The factual base of Plaintiff’s allegation is crystal clear:

“28. Defendant communicated with Plaintiff without Plaintiff’s prior consent, in connection with the collection of a debt, at a time or place known

1 or which should be known to be inconvenient to Plaintiff.” (Emphasis
2 added.)

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4 4. If true, and Plaintiff affirmatively asserts that this statement is true, ¶28
5 of the FAC is inherently a clear-cut violation of the FDCPA.

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7 5. Plaintiff’s FAC further specifies that Defendant TAK failed to provide
8 Plaintiff with lawful written debt verification notice after initially communicating
9 with Plaintiff on May 16, 2011, in connection with its attempt to collect the alleged
10 debt.

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12 “29. Defendant failed to send Plaintiff any written debt verification notice
13 within five days after Defendant’s initial communication with Plaintiff on
14 May 16, 2011, in connection with the collection of an alleged debt, as
15 required by 15 U.S.C. §1692g(a) et seq.”

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18 6. If true, and Plaintiff affirmatively asserts that this statement is true, ¶29
19 of the FAC is inherently a clear-cut violation of the Fair Debt Collection Practices
20 Act (“FDCPA”).

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22 7. Plaintiff’s allegations are supported by Defendant TAK’s own admissions
23 as presented in its motion, and the Defendant has provided no admissible evidence,
24 facts, circumstances or existing law that would justify granting its motion to
25 dismiss.

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II. ARGUMENT

8. In its motion to dismiss, Defendant TAK outlines 5 reasons why Plaintiff's FAC fails to state a claim upon which relief can be granted. The Plaintiff will respond to each, beginning with Defendant TAK's Memorandum of Points and Authorities, section I, ¶(1), which states as follows:

“(1) TAK’s act of responding to Plaintiff’s request to contact him regarding the credit report inquiry did not constitute an “initial communication” triggering any of the requirements under the FDCPA and/or the Rosenthal Act;” (Emphasis added.)

9. The FDCPA was enacted to apply not just to the collection of a debt, but also to activities that are “in connection with the collection of a debt.”¹

10. The FDCPA was comprehensively written to cover all actions, “directly or indirectly”² including “attempts”³ to collect “alleged”⁴ or “asserted”⁵ consumer debts.

11. Defendant TAK admits in its motion that it initiated a soft pull of Plaintiff's consumer report, in connection with the collection of an alleged debt. As a debt collection firm, Defendant TAK's soft pull of Plaintiff's consumer report

¹ 15 U.S.C. §§ 1692c(a), 1691c(b), 1692e, 1692g

² 15 U.S.C. § 1692a(2), 1692a(6)

³ 15 U.S.C. §§ 1692a(6), 1692f, 1692j(a)

⁴ 15 U.S.C. §§ 1692a(3), 1692a(5), 1692a(6)(F), 1692g

⁵ 15 U.S.C. § 1692a(6)

1 represented an “*indirect*” collection activity subject to the FDCPA and California’s
2 Rosenthal Act.

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4 12. Defendant TAK admits in its motion that during the phone call between
5 TAK and Plaintiff, it *conveyed information regarding the alleged debt, in*
6 *connection with its indirect attempt to collect the alleged debt.* [MTD, section I,
7 A, lines 8-10.]

8
9 13. The FDCPA, 15 U.S.C. §1692a(2) reads:

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11 “The term “*communication*” means the conveying of information regarding
12 a debt directly or indirectly to any person through any medium.” (*Emphasis*
13 *added.*)

14
15 14. Defendant TAK did not contact Plaintiff before or after its pull of
16 Plaintiff’s consumer report until voluntarily communicating with Plaintiff on May
17 16, 2011. Thus, the May 16, 2011 phone call between TAK and Plaintiff clearly
18 qualifies as an “*initial communication*” within the meaning of the FDCPA
19 §1692g(a), and clearly subjected Defendant TAK to **all** of the written or oral debt
20 verification notice requirements set forth in the FDCPA §1692g(a), which reads in
21 relevant part:

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23
24 “(a) Within five days after the *initial communication* with a consumer in
25
26 *connection with the collection of any debt*, a debt collector shall, unless the
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1 following information is contained in the initial communication or the
2 consumer has paid the debt, send the consumer a written notice containing—

3 (1) the amount of the debt;

4 (2) the name of the creditor to whom the debt is owed;

5 (3) a statement that unless the consumer, within thirty days after receipt of
6 the notice, disputes the validity of the debt, or any portion thereof, the debt
7 will be assumed to be valid by the debt collector;

8 (4) a statement that if the consumer notifies the debt collector in writing
9 within the thirty-day period that the debt, or any portion thereof, is disputed,
10 the debt collector will obtain verification of the debt or a copy of a judgment
11 against the consumer and a copy of such verification or judgment will be
12 mailed to the consumer by the debt collector; and

13 (5) a statement that, upon the consumer's written request within the thirty-
14 day period, the debt collector will provide the consumer with the name and
15 address of the original creditor, if different from the current creditor.”

16 *(Emphasis added.)*

17 15. The FDCPA does not require that the “initial communication” with
18 Plaintiff be a direct attempt to collect, but may also be “in connection with the
19 collection” of an alleged debt, as Defendant TAK admits was the case, in order to
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1 subject Defendant TAK to the strict verification notice requirements under section
2 1692g(a).
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4 16. Nevertheless, With respect to oral debt verification, at section IV, ¶D,
5 lines 25-26 of its motion, Defendant TAK's motion contends as follows:

6 *"Plaintiff was given oral notice of the debt and no further written notice was*
7 *required under 15 U.S.C. §1692g(a)." (Emphasis added.)*
8

9 17. This statement is misleading. *"Oral notice of a debt"* is not defined
10 anywhere in the FDCPA. The parties agree that information regarding an alleged
11 debt, in connection with the collection of an alleged debt, was conveyed by
12 Defendant TAK to the Plaintiff. However, while this "oral notice" of the alleged
13 debt may comply with notice required under subsections 1692g(a)(1) –(2), it does
14 not comply with the notice requirements under subsections 1692g(a)(3)–(5).
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17 18. Defendant TAK's motion supports Plaintiff's allegation that lawful oral
18 debt verification notice was not provided to Plaintiff. Otherwise, Defendant TAK
19 would not attempt to explain why Plaintiff was not entitled to any debt verification
20 notice in the first place - at section IV, paragraph A:
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23 *"A communication that does not attempt to collect upon a debt but merely*
24 *[sic] informs the debtor about the current status of their account is not a*
25 *communication subject to the strict requirements of the FDCPA."*
26
27 *(Emphasis added.)*
28

1 19. Defendant TAK may be correct with respect to a debt that is not in
2 default, but is incorrect with respect to an alleged defaulted debt. Defendant TAK
3 cites *Bailey v. Security National Servicing Corporation*, 154 F.3d 384-389 (7th Cir.
4 1998) in support of its claim. However, in *Bailey*, defendants Wendover and
5 Security National Servicing Corporation (“*Security*”) were not collecting on an
6 alleged defaulted debt, but were instead collecting on a debt under a new
7 forbearance agreement that was current. The appellate court affirmed the district
8 court’s ruling that because the subject debt pursued by *Security* was not in default
9 but rather current under a new forbearance agreement, the defendants were not
10 considered “debt collectors” and thus not subject to the verification requirements
11 under the FDCPA. The *Bailey* case bears no relationship to the facts and
12 circumstances of the present action before the Court, nor does it relieve Defendant
13 TAK of its debt verification notice obligations, oral or written, under section
14 1692g(a).

15 20. Defendant TAK did not provide Plaintiff with lawful oral debt
16 verification, and therefore the Plaintiff was entitled to written debt verification
17 notice, which Defendant TAK admits it did not provide. Thus, Defendant TAK’s
18 violation of FDCPA 15 U.S.C. §1692g(a), due to its failure to comply with the
19 debt verification notice requirements thereof, represents an inherent violation of
20 California’s Rosenthal FDCPA, under Cal. Civ. Code §1788.17.

1 21. At section I, ¶(2) of its motion, Defendant TAK claims:

2 *“(2) Plaintiff invited TAK to contact him concerning the debt, thereby*
 3 *consenting to TAK’s subsequent phone call;” (Emphasis added.)*

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 5 22. Defendant TAK is apparently confused, first claiming in ¶(1) that TAK
 6 was “*requested*” to contact Plaintiff “*regarding the credit report inquiry*”, and then
 7 in ¶(2), claiming TAK was “*invited*” to contact Plaintiff “*concerning the debt*”. In
 8 fact, neither is correct, although it is important to note that Defendant TAK’s
 9 admission that it called Plaintiff “*regarding the credit report inquiry*” and
 10 “*concerning the debt*”, ¶(2) further supports Plaintiff’s allegation that Defendant
 11 TAK communicated with Plaintiff “*in connection with the collection of an alleged*
 12 *debt*”, and “*conveyed information regarding an alleged debt*” – which clearly
 13 subjected Defendant TAK to the debt verification notice requirements under the
 14 FDCPA, regardless of whether or not Defendant TAK was “*invited*” or
 15 “*requested*” to call Plaintiff.
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20 23. Nevertheless, Plaintiff clearly laid out in the Notice of Pending Lawsuit
 21 (“NPL”) the conditions under which consent was granted to Defendant TAK to call
 22 Plaintiff’s cell phone, stated in the first sentence, which reads:
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24 “This notice is sent as a courtesy prior to filing suit, to provide an
 25 opportunity to amicably cure Tate & Kirlin Associates, Inc. violations of the
 26 Fair Credit Reporting Act (FCRA) 15 U.S.C. § 1681b, and the Fair Debt
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1 Collection Practices Act (FDCPA) 15 U.S.C. § 1692 et seq., and California's
2 Rosenthal Fair Debt Collection Practices Act, California Civil Code §
3 1788.12 et seq.” (***Emphasis added.***)
4

5 24. The key word in the first sentence is “cure” - as in “remedy”. Thus,
6 Defendant TAK was provided an opportunity and consent to call Plaintiff's cell
7 phone to “address the matters at hand”, with the “matters at hand” being a remedy
8 of its alleged violations of law – and for **no other purpose**.
9

10 25. Defendant TAK admits in its motion that it could have offered to “cure”
11 or “remedy” Plaintiff's allegations by providing written debt verification notice to
12 Plaintiff, as required under 15 U.S.C. § 1692g(a), but elected not to do so.
13

14 26. Having considered the verification notice requirements under the
15 FDCPA, and the five day window Plaintiff granted Defendant TAK to
16 communicate with Plaintiff, Defendant TAK admits that it disregarded the
17 conditions under which consent to contact Plaintiff was granted and called Plaintiff
18 not to cure or remedy Plaintiff's allegations, or discuss an amicable settlement -
19 but to convey unsubstantiated, incomplete information regarding an alleged debt,
20 in connection with its indirect attempt to collect an alleged debt – without lawful
21 notice under the FDCPA, which Defendant TAK then illegally attempted to pass
22 off as all the debt validation notice TAK was required to provide, and that was all
23 the Plaintiff was entitled to.
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1 27. Nowhere in Plaintiff's NPL does Plaintiff grant Defendant TAK consent
2 to call Plaintiff's cell phone to convey unsubstantiated, incomplete information
3 regarding an alleged debt in an attempt to justify its illegal collection activities and
4 then knowingly deprive Plaintiff of his right to lawful debt validation and debt
5 verification notice. Defendant TAK - a debt collection firm – knew that
6 permission to call Plaintiff for such a purpose was not granted by the Plaintiff,
7 regardless of *when* the call was made, and should have known that such an
8 unlawful communication would be inconvenient to the Plaintiff, thus representing a
9 clear violation of 15 U.S.C. §1692c(a)(1), which reads in relevant part:
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13 “(a) COMMUNICATION WITH THE CONSUMER GENERALLY. *Without*
14 *the prior consent of the consumer given directly to the debt collector or the*
15 *express permission of a court of competent jurisdiction, a debt collector may*
16 *not communicate with a consumer in connection with the collection of any*
17 *debt—*
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20 (1) *at any unusual time or place or a time or place known or which should be*
21 *known to be inconvenient to the consumer.” (Emphasis added.)*
22

23 28. Defendant TAK's violation of section 1692c(a)(1) represents an
24 inherent violation of California's Rosenthal FDCPA, Cal. Civ. Code §1788.17.
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26 29. At section I, ¶(3) of its motion, Defendant TAK claims:
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1 “(3) *The debt amount, character, and status were never misrepresented by*
2 *TAK. Plaintiff has not alleged any facts challenging the validity of the*
3 *debt or alleging that TAK misrepresented the debt amount, character, or*
4 *status;” (Emphasis added.)*

5
6 30. The first sentence of ¶(3) amounts to nothing more than “hearsay”.

7
8 Defendant TAK’s attorneys Jeanne L. Zimmer (“Zimmer”) and Keith A. Yeomans
9 (“Yeomans”) of CARLSON & MESSER LLP, have no firsthand knowledge as to
10 the accuracy of the amount, character or status of the alleged debt, nor has Zimmer
11 and Yeomans specified that any evidence supports their claim, or that any
12 evidentiary support of their claim is likely after a reasonable opportunity to
13 investigate further. Instead Zimmer and Yeomans attempt to mislead the Court by
14 introducing baseless, unsworn testimony couched as “fact”, which should not be
15 considered or tolerated by the Court.⁶

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19 31. The Plaintiff disputed the alleged debt with TAK during the phone call
20 of May 16, 2011, and referenced this in its FAC (¶26). The alleged debt is
21 baseless. Therefore any representation of the amount, character, or status of the
22 alleged debt is baseless.

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26 ⁶ See *Trinsey v. Pagliaro*, 229 F. Supp. 647 – Dist. Court, ED Pennsylvania (May
27 28, 1964); and 415 Pa. 580 - Pa: Supreme Court (1964) [Appeal quashed] -
28 “*Statements by counsel in their briefs or argument...are not sufficient for purposes*
 of granting a motion to dismiss or summary judgment.”

1 32. At section IV, lines 16-18, Defendant TAK's motion further contends:

2 *"It is undisputed that the debt at issue was the result of a voluntary credit*
3 *transaction and that TKA [sic] obtained Plaintiff's credit report because it*
4 *was assigned to collect Plaintiff's debt."*
5

6 33. This contention represents another example of nothing more than
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8 "hearsay" offered by Defendant TAK's attorneys, Zimmer and Yeomans, neither
9 of whom have any firsthand knowledge of the legitimacy of the alleged debt, or
10 Defendant TAK's right to directly or indirectly collect, or attempt to collect the
11 alleged debt, nor has Zimmer and Yeomans specified that any evidence supports
12 their claim, or that any evidentiary support of their claim is likely after a
13 reasonable opportunity to investigate further. Instead, Zimmer and Yeomans have
14 attempted to mislead the Court by introducing baseless, unsworn testimony
15 couched as "fact", which should not be considered or tolerated by the Court.⁷
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18 34. Defendant TAK's MTD is littered with one baseless contention after
19 another by Zimmer and Yeomans, which they repeatedly attempt to introduce as
20 "undisputed fact", without any mention of evidence supporting their claims, or
21 specifying that evidentiary support is likely after a reasonable opportunity for
22 further investigation. Attorneys Zimmer and Yeomans have no firsthand
23 knowledge of ANY of the facts or circumstances in the present action, and
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28 ⁷ *Ibid.*, page 12.

1 therefore each such baseless statement is an egregious attempt to mislead the
2 Court.

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4 35. According to Zimmer and Yeomans, Defendant TAK pulled Plaintiff's
5 consumer report because it had a "legitimate" debt to collect, and a "legitimate"
6 basis to collect, or attempt to collect. However, if such were the case, then
7 Defendant TAK should have been **eager** to "remedy" Plaintiff's allegations by
8 offering Plaintiff lawful written or oral validation and verification notice of the
9 alleged debt, which to date, Defendant TAK admits it has refused to provide.
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12 36. Defendant TAK's false representation of the amount, character, and
13 status of the alleged debt owed by Plaintiff violated the FDCPA 15 U.S.C
14 §1692e(2)(A), and thus represents an inherent violation of California's Rosenthal
15 FDCPA, under Cal. Civ. Code §1788.17.
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17 37. At section I, ¶(4) of its motion, Defendant TAK claims:
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19 ***"(4) Plaintiff was not entitled to any written notice following the phone***
20 ***call between TAK and Plaintiff;" (Emphasis added.)***
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22 38. This claim does not square with the plain language and meaning of the
23 FDCPA, given Defendant TAK's own admissions. The debt verification notice
24 requirements under the FDCPA apply to Defendant TAK regardless of whether its
25 communication with Plaintiff was invited or not, and whether or not it was a direct
26 attempt to collect or "in connection with the collection" of a debt. Defendant TAK
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1 did not provide lawful debt verification notice as required under the FDCPA
2 because, as it specifically and incorrectly claims, the Plaintiff was not entitled.
3

4 39. The Plaintiff was entitled to full debt verification notice pursuant to the
5 FDCPA either during or after the phone call between Defendant TAK and Plaintiff,
6 which Defendant TAK admits it did not provide, thus violating the FDCPA
7 §1692g(a), which represents an inherent violation of California's Rosenthal Act,
8 Cal. Civ. Code §1788.17.
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10 40. At section I, ¶(5) of its motion, Defendant TAK claims:
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12 *"(5) TAK's alleged inquiry into Plaintiff's credit report was allowed under*
13 *the FCRA because TAK was assigned to collect a debt owed by Plaintiff."*
14 *(Emphasis added.)*
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16 41. At section IV, page 8, lines 16-18, Defendant TAK's motion contends
17 as follows:
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19 *"It is undisputed that the debt at issue was the result of a voluntary credit*
20 *transaction and that TKA [sic] obtained Plaintiff's credit report because it was*
21 *assigned to collect Plaintiff's debt. FAC ¶22."* *(Emphasis added.)*
22

23 42. Plaintiff's FAC ¶22 does not affirm the validity of the debt. It alleges
24 that Defendant TAK conveyed information regarding a debt, in connection with
25 the collection of a debt.
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1 43. Once again - Zimmer and Yeomans boldly offer the Court nothing more
2 than “hearsay”, as neither has any firsthand knowledge of the nature or legitimacy
3 of the alleged debt or Defendant TAK’s lawful right to directly or indirectly
4 collect, or attempt to collect the alleged debt, or the full content of the phone call
5 between Defendant TAK and Plaintiff, nor has Zimmer and Yeomans specified
6 that any evidence supports their claim, or that any evidentiary support of their
7 claim is likely after a reasonable opportunity to investigate further. Instead
8 Zimmer and Yeomans attempt to mislead the Court by introducing baseless,
9 unsworn testimony into the record couched as “fact”, which should not be
10 considered or tolerated by the Court.⁸
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15 44. Defendant TAK has failed to provide any admissible evidence, facts or
16 circumstances that establish the legitimacy, or validity of the alleged debt owed by
17 Plaintiff, or its right to directly or indirectly collect, or attempt to collect any
18 alleged debt owed by Plaintiff.
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20 45. Defendant TAK has failed to provide any admissible facts, evidence,
21 circumstances or existing law that would justify granting its motion to dismiss.
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23 46. Plaintiff respectfully requests that the Court take notice of the well-
24 pleaded allegations of the *pro se* Plaintiff’s First Amended Complaint, which this
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27 ⁸ *Ibid.*, page 12.
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1 Court must accept as true at this juncture of the proceedings, and which, in light of
2 the Plaintiff's *pro se* status, the Court must construe liberally, and hold to a less
3 stringent standard than formal pleadings drafted by an attorney. [See Haines v.
4 Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed. 2d 652 (1972)]

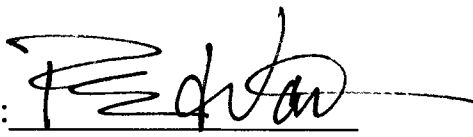
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7 **III. CONCLUSION**

8 47. For the reasons stated above, this Court should deny Defendant TAK's
9 Motion to Dismiss, and order its attorneys, Jeanne L. Zimmer and Keith A.
10 Yeomans of CARLSON & MESSER LLP, to show cause as to why their repeated
11 attempts to introduce baseless contentions couched as undisputed fact without
12 referencing supporting evidence or likely evidentiary support after a reasonable
13 opportunity for further investigation, has not violated FRCP 11(b)(3), and should
14 not be sanctioned therefore.

17 48. In the interests of justice, in the event that Plaintiff's FAC is deficient in
18 any manner, the Plaintiff respectfully requests that the Court grant Plaintiff leave to
19 amend the FAC.

21 Respectfully submitted,

22 Dated: November 7, 2011

24
25 By: 
26 Ruben T. Varela
27 Plaintiff in Pro Per
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing will be mailed to all parties this 7th day of November, 2011.

Respectfully,



Ruben T. Varela,
Plaintiff in Pro Per
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